

(ORDER LIST: 596 U.S.)

MONDAY, MARCH 28, 2022

ORDERS IN PENDING CASES

21M96 NICHOLS, DeMARCO, ET AL. V. IL DEPT. OF TRANSP., ET AL.

21M97 SIMCOX, CHRIS A. V. ARIZONA

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

21M98 JESSIE D. V. AZ DEPT OF CHILD SAFETY, ET AL.

21M99 ROSE, EDWARD J. V. ARIZONA

The motions for leave to file petitions for writs of certiorari with the supplemental appendices under seal are granted.

21-7064 SQUIRES, LARRY V. MSPB, ET AL.

21-7067 BAKER, KIMMIE D. V. ARIZONA

21-7205 HOLLAND, LEE V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are denied. Petitioners are allowed until April 18, 2022, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

21-468 NATIONAL PORK PRODUCERS, ET AL. V. ROSS, KAREN, ET AL.

The petition for a writ of certiorari is granted.

21-846 CRUZ, JOHN M. V. ARIZONA

The petition for a writ of certiorari is granted limited to the following question: Whether the Arizona Supreme Court's

holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

21-869 ANDY WARHOL FOUND., INC. V. GOLDSMITH, LYNN, ET AL.

The petition for a writ of certiorari is granted.

CERTIORARI DENIED

21-475 BROOKHART, WARDEN V. SMITH, KENNETH

21-622 DEVINE, SUSAN, E. V. ABSOLUTE ACTIVIST VALUE, ET AL.

21-686 ESPARRAGUERA, MARIA V. DEPT. OF ARMY

21-711 MARKHAM CONCEPTS, INC., ET AL. V. HASBRO, INC., ET AL.

21-721 TRANSPACIFIC STEEL LLC, ET AL. V. UNITED STATES, ET AL.

21-771 HERRERA, JUSTIN V. CLEVELAND, THERESA, ET AL.

21-797 ALUKER, SERGE M. V. YAN, SIMIN

21-860 DOE, JANE V. WHITE, TIMOTHY, ET AL.

21-1022 GARZA, DANIEL V. LOS ANGELES, CA

21-1033 MANDEL, EDWARD V. WHITE NILE SOFTWARE, INC., ET AL.

21-1034 KAGEL, PETER V. RAFTERY, JAY L., ET AL.

21-1045 I. M. V. MONTGOMERY CTY. DEPT. OF HEALTH

21-1048 CABALLERO, CESAR, ET AL. V. UNITED STATES, ET AL.

21-1055 JOLON-VELASQUEZ, LEA V. GARLAND, ATT'Y GEN.

21-1083 CHOI, JAY H. V. VIRGINIA

21-1084 HELTZEL, JANET, ET AL. V. YOUNGKIN, GOV. OF VA, ET AL.

21-1099 STERES, THOMAS C. V. CURRAN, WARDEN, ET AL.

21-1108 ENPH V. UNITED STATES, ET AL.

21-1111 GIHA, CALEB F. V. GARLAND, ATT'Y GEN.

21-1113 FREDIN, BROCK V. MIDDLECAMP, LINDSEY E., ET AL.

21-1125 SCHANTZ, MATTHEW V. DELOACH, BENNY

21-1131 MIGHTY, TRUDY V. CARBALLOSA, MIGUEL, ET AL.

21-1133 ABRAHAMSEN, CHARLES V. DEPT. OF VA
21-1139 DAIKIN INDUSTRIES, LTD., ET AL. V. CHEMOURS CO. FC, LLC
21-1141 WADE, CHARLES V. LEWIS, GORDON
21-1150 FINIZIE, SHARON, ET AL. V. DEPT. OF VA
21-1165 COLE, JANHOI V. UNITED STATES
21-1198 WEIR, ROBERT D., ET AL. V. UNITED STATES
21-1201 SMITH, MICHAEL D. V. UNITED STATES
21-1209 MILLER, JENNIFER B. V. BANK OF NEW YORK MELLON, ET AL.
21-5717 BLACKMON, BRANDON D. V. UNITED STATES
21-6099 CODY, SANDCHASE V. UNITED STATES
21-6150 GHOLSTON, JACQUES S. V. UNITED STATES
21-6154 FORD, SHAWN V. UNITED STATES
21-6200 RUIZ, JESUS V. UNITED STATES
21-6229 HANDLEY, KYLE S. V. CALIFORNIA
21-6383 SINGH, HARINDER V. UNITED STATES
21-6386 SYDNOR, ANTJUAN V. CALIFORNIA
21-6740 CHIQUITO, TEDDY V. UNITED STATES, ET AL.
21-6909 GERALDS, MARK A. V. DIXON, SEC., FL DOC
21-6914 KENNEDY, MICHAEL P. V. LUMPKIN, DIR., TX DCJ
21-6917 CLARK, JOSEPH E. V. BRITT, SHAWN L., ET AL.
21-6925 YI, CHONG SU V. HOGAN, GOV. OF MD, ET AL.
21-6927 WALLGREN, RICKEY R. V. WHITTEN, WARDEN
21-6931 WHITE, TOM I. V. LUMPKIN, DIR., TX DCJ
21-6935 BLAKE, RICHARD R. V. NORTHGLENN, CO
21-6945 BYRD, JOHNNIE W. V. GRAY, WARDEN
21-6949 RIOS, RENO F. V. CLARK, WARDEN
21-6950 ROSA, STEPHEN V. NEW YORK
21-6957 THACKER, DAVID K. V. LUMPKIN, DIR., TX DCJ

21-6961 PALACIO, MAURO C. V. CARAWAY, JUSTIN, ET AL.
21-6964 SMITH, CARLTON V. FL DOC
21-6967 MADDOX, LEMONTA M. V. CALIFORNIA
21-6968 JONES, JAY A. V. MARYLAND
21-6971 CASE, BYRON V. DOUGLAS COUNTY, OR, ET AL.
21-6973 JACKS, LARRY L. V. LYNCH, WARDEN
21-6975 LOLA, DAVID J. V. RAMSAY, SHERIFF
21-7007 RODRIGUEZ, AMADOR V. LUMPKIN, DIR., TX DCJ
21-7008 ACOFF, MARCO D. V. ALABAMA
21-7009 LOGA-NEGRU, CRISTIAN M. V. WISCONSIN
21-7022 GIL, PATRICK N. V. VIRGINIA
21-7077 KURKJIAN, CATHERINE V. WORMUTH, SEC. OF ARMY
21-7085 LARSON, KRISTINA M. V. AMERICAN HOME PRODUCTS
21-7106 NYAMUSEVYA, LEONARD V. COURT OF COMMON PLEAS, ET AL.
21-7112 SOVANN, SOPHANA V. WAKEFIELD, SUPT., SMITHFIELD
21-7171 SHERWOOD, ROBIN L. V. NEOTTI, WARDEN
21-7175 SMEATON, KEITH V. USDC WD LA
21-7181 SAMUELS, MARY E. V. ESPINOZA, WARDEN
21-7189 ALLEN, DEIMEYON X. V. LAUGHLIN, WARDEN
21-7204 HINES, COREY L. V. UNITED STATES
21-7219 SUTTLES, LORENZO V. UNITED STATES
21-7220 SKYBERG, JESSE K. V. UNITED STATES
21-7221 MOODY, ALFRED L. V. UNITED STATES
21-7222 MENDOZA, HUGO V. V. UNITED STATES
21-7226 MARTIN, CHRISTOPHER R. V. UNITED STATES
21-7227 THODY, DANIEL I. V. UNITED STATES
21-7238 WRICE, HOLLI V. UNITED STATES
21-7239 ARRINGTON, MICHAEL V. UNITED STATES

21-7245 POFF, JULIA A. V. UNITED STATES
21-7249 HILL, JACOB I. V. UNITED STATES
21-7256 ROSALES-SANCHEZ, CLEMENTE V. UNITED STATES
21-7258 CONTRERAS-ROJAS, FERNANDO V. UNITED STATES
21-7266 ZAMORA-REYES, FREDDY V. UNITED STATES
21-7268 FARCA, ROSS A. V. UNITED STATES
21-7269 CLARKE, JOSEPH P. V. UNITED STATES
21-7274 BASEY, KALEB L. V. UNITED STATES
21-7276 RODRIGUEZ, JULIO V. UNITED STATES
21-7279 FOSTER, CHARLIE V. UNITED STATES
21-7294 LACEY, DANIEL G. V. GOOTKIN, DIR., MT DOC, ET AL.
21-7297 GARCIA, JAIME B. V. MONTGOMERY, WARDEN

 The petitions for writs of certiorari are denied.

21-6916 MARTILLO, JOACHIM V. TWITTER, INC., ET AL.

 The petition for a writ of certiorari before judgment is denied.

21-6963 LEE, VINCENT X. V. MISSOURI, ET AL.

 The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

21-7230 MORGAN, GEMAR V. UNITED STATES

 The petition for a writ of certiorari before judgment is denied.

21-7252 STINSON, TERRANCE V. UNITED STATES

 The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

MANDAMUS DENIED

21-6978 IN RE ISAIAH HARRIS

21-6981 IN RE BENNY D. GIBSON

The petitions for writs of mandamus are denied.

REHEARINGS DENIED

20-1665 PALMER, WILLIAM S. V. WILLIAMS, HAROLYN

21-5402 WEST, RONALD E. V. UNITED STATES

21-5887 NEIL, MIGUEL V. FORSHEY, WARDEN

21-5914 TABOR, TONY J. V. COLEMAN, VINCENT

21-5988 JONES, STEPHEN B. V. MARYLAND

21-6058 LOLA, DAVID J. V. FLORIDA

21-6168 WHITE, VANCE L. V. LUMPKIN, DIR., TX DCJ

21-6169 YAAG, DONALD S. V. BAKER, WARDEN, ET AL.

21-6267 BROWN-MALLARD, ADRIENNE V. POTOMAC CONCRETE, INC., ET AL.

21-6477 PARKER, MICHAEL E. V. KIJAKAZI, COMM'R, SOCIAL SEC.

21-6576 PEACOCK, NICHOLAS G. V. UNITED STATES

21-6597 WHREN, JASON V. UNITED STATES

The petitions for rehearing are denied.

Statement of ALITO, J.

SUPREME COURT OF THE UNITED STATES

TEXAS, ET AL. *v.* COMMISSIONER OF INTERNAL
REVENUE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21–379. Decided March 28, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, respecting the denial of certiorari.

This case presents a fundamental question about the limits on the Federal Government’s authority to delegate its powers to private actors. See *Department of Transportation v. Association of American Railroads*, 575 U. S. 43 (2015); *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936). Unfortunately, the case presents threshold questions that could complicate our review of that important question, but the statutory scheme at issue here points up the need to clarify the private non-delegation doctrine in an appropriate future case.

I

Medicaid is a program that is jointly funded by the States and the Federal Government, and while a State is not required to participate in the program, all have chosen or at least found it necessary to do so.

As a condition of participation, States must ensure that they fund their part of the program “on an actuarially sound basis.” 42 U. S. C. §1396b(m)(2)(A)(iii). Congress did not explain what it meant by “actuarially sound,” but the Department of Health and Human Services (HHS) has defined that term to require certification of state payment schemes by actuaries who meet “the qualification[s]” of the Ameri-

Statement of ALITO, J.

can Academy of Actuaries and “follow the practice standards established” by the Actuarial Standards Board, which is a private entity. 42 CFR §438.6(c) (2002).

The Patient Protection and Affordable Care Act imposed a tax called the Health Insurance Provider Fee (HIPF) as a lump sum on all covered health insurance providers, starting at \$8 billion total in 2014 and rising each year afterwards. 26 CFR §57.4(a)(3) (2021). The HIPF was assessed annually on each provider based on its market share, which the Internal Revenue Service calculated by reference to each provider’s net premiums for the previous year. See §§ 57.1(a)–(c), 57.4(a)–(d). The HIPF applied to “any entity which provides health insurance,” excluding “any government entity.” §9010(c)(1), 124 Stat. 866. Thus, if a State used a private health maintenance organization (HMO) to assist it in running its Medicaid program, as nearly all States do, that HMO was generally “an entity” required to pay its share of the HIPF.

In 2015, the Actuarial Standards Board published a binding definition of “actuarial soundness” as used in the Medicaid statute. Known as ASOP 49, this standard required that States include funds for any “government-mandated assessments, fees, and taxes” in their payments to private managed-care organizations that assist States in the management of Medicaid. In simple terms, this meant that States had to reimburse their HMOs for the cost of those HMOs’ share of the annual HIPF. If a State did not do so, its Medicaid payment scheme could not be certified as “actuarially sound.” *Texas v. United States*, 300 F. Supp. 3d 810, 845 (ND Tex. 2018). The Actuarial Standards Board thus effectively mandated that States absorb the costs of the HIPF taxes Congress assessed on non-government entities.

Texas and four other States sued HHS in Federal District Court in October 2015, seeking the return of the funds they paid to cover the HIPF. The States alleged that under

Statement of ALITO, J.

HHS’s rule, an actuary can deprive a State of its ability to meet the conditions of participating in Medicaid by refusing to certify the State’s payment structure. As a consequence, the States argued, HHS had impermissibly delegated its authority to a private entity. While the litigation was pending, Congress repealed the HIPF in 2020, but the regulation empowering the Actuarial Standards Board to define when a State’s Medicaid payments can be certified remains on the books. 42 CFR §438.7 (2021); §438.2.

In 2018, the District Court held that HHS had violated the private non-delegation doctrine, but in July 2020, the Fifth Circuit reversed, holding that the doctrine had not been violated because HHS retained control over the private entities’ process. The Court of Appeals denied rehearing en banc over a dissent. *Texas v. Rettig*, 993 F. 3d 408 (2021) (*per curiam*).

II

I agree with petitioners that this case presents an important separation-of-powers question. “Our Constitution, by careful design, prescribes a process for making law, and with that process there are many accountability checkpoints.” *American Railroads*, 575 U. S., at 61 (ALITO, J., concurring). To ensure the Government remains accountable to the public, it “cannot delegate regulatory authority to a private entity.” *Ibid.*; see also *Carter Coal*, 298 U. S. 238. Here, however, that is precisely what happened. What was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group. And this was no inconsequential matter. It has cost the States hundreds of millions of dollars.

The Government urges us not to grant review because Congress has repealed the HIPF and therefore the delega-

Statement of ALITO, J.

tion will not cause the States any future injury. The Government also contends that any direct challenge to the 2002 HHS regulation giving the Actuarial Standards Board its power is barred by the applicable 6-year statute of limitations. 28 U. S. C. §2401(a). The States respond that the dictates of the Actuarial Standards Board will continue to regulate the “complex ongoing relationship” between the States and the Federal Government in the Medicaid Act. *Maine Community Health Options v. United States*, 590 U. S. ___, ___–___ (2020) (slip op., at 29–30).

In light of the complications highlighted by the Government, I reluctantly concur in the denial of certiorari. However, if the determinations of the Actuarial Standards Board have any future effect, review should be granted in an appropriate case.